IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

# STATE OF TENNESSEE v. WILLIAM DAVID MICHENER

**Appeal from the Circuit Court for Putnam County**
**No. 06-0356 Leon Burns, Judge**

---

**No. M2007-02417-CCA-R3-CD - Filed February 20, 2009**

---

The Defendant, William David Michener, was charged with first degree murder and abuse of a corpse. He obtained a judgment of acquittal of first degree murder from the trial court following the State's proof. A jury then convicted him of voluntary manslaughter and abuse of a corpse. In this direct appeal, he argues that (1) the evidence at trial was insufficient to convict him of voluntary manslaughter; (2) the trial court improperly denied his motion for a mistrial after a certain statement by a State's witness; and (3) the trial court improperly denied his motion to sever his first degree murder count from his abuse of a corpse count. After our review, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS J., joined. NORMA MCGEE OGLE, J., concurred in results only.

E.J. Mackie, Cookeville, Tennessee, for the appellant, William David Michener.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William E. Gibson, District Attorney General; and Beth Willis, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

The events underlying this case began on March 21, 2006. The State first presented the victim's mother, Naomi Murphy, who testified that at about 12:00 or 1:00 p.m. on that day, she drove the forty-year-old victim, Terry Murphy, and his girlfriend, Kathy Miller, to cash the victim's unemployment check. She then drove to the liquor store, where the victim and Kathy bought some

beer. Kathy and the victim had been dating for about a year; Kathy was married to a man named Gene Miller, but she had not lived with him for about fifteen years. Kathy is the Defendant's sister.

The three then returned to Naomi's house, at which point Kathy and the victim left. They returned at about 5:00 p.m. and changed clothes. At that time, it was evident to Naomi that the two of them had been drinking. Kathy and the victim left again. Naomi testified that the victim was a "bully" when he was drunk but said that she had never witnessed physical violence between him and Kathy.

According to Naomi's telephone caller identification, she received a call from the Defendant's house at 9:06 that evening. A male voice that Naomi did not recognize said that "[the victim] wants you to come get him." Naomi did not go to pick the victim up, however, because she "thought it was some of the kids [at the Defendant's property] calling, and [she] knew if [the victim] wanted [her] to come pick him up he would call [her], and he never did call, so [she] didn't go."

Naomi received a call from Kathy at about 8:10 a.m. the next day. Kathy told Naomi that she had woken up around 12:30 a.m. that morning and that someone had told her the victim left the Defendant's property on foot. Kathy called again at about 8:30 a.m. and told Naomi that both of the victim's coats were still present on the Defendant's property, that it had been very cold the night before, and that she consequently did not believe the victim would have tried to walk home.

Naomi decided "something's not right," and drove to the Defendant's property, which consisted of a house in which the Defendant's parents lived and a nearby trailer in which the Defendant lived. As Naomi drove her vehicle onto the property, she saw the Defendant and Kathy come out of the house. The latter held the victim's two coats. The Defendant approached Naomi's car and said to her, "Oh, you know [the victim], he'll show up later this afternoon." He also told her that the victim had taken a pint of liquor with him.

Naomi drove to a few neighbors' houses but did not find the victim. She also drove to Mayland, a small town nearby in which the victim had some friends, but did not find him there. When she returned to her house, she called the Sheriff's Department but was told they could not do anything for forty-eight hours. Nevertheless, at about 9:00 p.m. that evening, she received a call informing her that the victim's body had been found on the Defendant's property.

David Roberts, one of Kathy's sons, also testified for the State. He had been present on the Defendant's property during the time in question. He was fourteen years old and had a good relationship with the Defendant, his uncle, at the time. He testified that for about half of each month, he lived with Kathy at her house and that for the other half, he lived with his grandparents in the house on the Defendant's property. Roberts was also acquainted with the victim, who he said became aggressive and liked to fight when drunk. He had seen the victim assault Kathy on two occasions. On the first occasion, Roberts had to pull the victim off Kathy in order to stop him from hitting her. He did not describe the second incident in detail, noting only that it had occurred at Kathy's house.

On March 21, 2006, he returned to the Defendant's house immediately after school. Kathy, the victim, and the Defendant were drinking there and were "wasted." Roberts and his fifteen-year-old cousin, Robert Schill, began drinking with them. Throughout the evening, Kathy and the victim argued about Kathy's husband, Gene, being back in town. At about 8:00 p.m., Kathy, the victim, and the Defendant moved from the house to the Defendant's nearby trailer. Some time after that, it was decided that the victim should leave. Roberts called Naomi and asked her to come and pick up the victim.

At about 9:40 p.m., Roberts went to sleep on the couch in the house, his usual resting place when staying with his grandparents. His grandfather and grandmother were also in the house asleep. Roberts said Schill slept in his own room. At about 10:40 p.m., Schill woke Roberts. Roberts went back to sleep for a few minutes. Schill woke him again. Roberts followed Schill and the Defendant from the house to the back porch of the Defendant's trailer, where he saw the victim's body lying on the ground a few feet to the side of the porch. The victim's face was "mutilated," and Roberts saw "[q]uite a bit" of "blood and brains" around the porch area.

The Defendant told Roberts to retrieve a jug of Clorox from inside the trailer, which Roberts did. The Defendant poured the Clorox onto the porch, where a substantial quantity of blood had pooled. Roberts and Schill obtained some rags and attempted to clean the blood off of the porch. They then assisted the Defendant in dragging the victim's body along a trail into the woods. Both of them grabbed one of the victim's legs in order to do so. After a few minutes, the Defendant told them to stop and to help him remove the victim's clothes. Roberts pulled off one of the victim's boots and then stopped participating. Although it was dark, Roberts could tell the victim had been shot in the head. He had not heard a gunshot. Roberts said that Schill and the Defendant took off the rest of the victim's clothes. Back at the trailer, the Defendant put the victim's clothes into a bag. Kathy was passed out in the trailer during these events.

Roberts then went back to sleep. He went to school the next day as normal. The police arrived at the Defendant's property at around 4:00 p.m. the next day, March 22, 2006, just as Roberts returned from school. Because the Defendant had told him not to tell anyone about the previous night's events, Roberts initially told the police he did not know the victim's whereabouts. After about thirty to forty-five minutes, however, he told them the victim's body was in the woods.

Schill, Roberts' cousin and the nephew of both Kathy and the Defendant, also testified for the State. Schill, like Roberts, said that the victim was aggressive when drunk and that he had twice witnessed the victim strike Kathy. On the first occasion, Schill had seen the victim, between the Defendant's trailer and the house, repeatedly hitting Kathy while calling her a "stupid bitch." The second occasion began in the Defendant's trailer in the presence of both Schill and the Defendant. The victim had announced his intention to strike Kathy, who was passed out nearby, until she woke up. To that end, the victim had begun to hit her with both his open hand and his closed fist. Schill and the Defendant had then dragged the victim out of the house. A few minutes later they had both exited the trailer, through different doors, to make sure the victim had left. Schill had not immediately seen the victim outside but heard a fight. He had run around the trailer to find the

victim holding the Defendant up against the door, preparing to hit him. Schill hit the victim on the back of the head with a rock in order to get him off the Defendant.

Schill also testified that he had seen Kathy with bruises on her face on six or seven occasions. Verbal arguing between her and the victim was not unusual. Schill characterized the Defendant as a generally peaceful person who attempts to avoid fighting. Schill also said that the Defendant would frequently back down from the victim rather than fight him. The Defendant also treated Kathy well and tried to protect her.

Schill confirmed his presence on the Defendant's property on March 21, 2006. He said that the victim refused to leave and that he called Naomi to pick up the victim. Naomi agreed to do so. Schill called her again five to ten minutes thereafter, but Naomi did not answer. Like Roberts, Schill said he then went to sleep on the couch. The Defendant woke him some time thereafter. Arriving outside, he saw the victim's body "a few feet off the porch" but said he could not see the victim's injuries because of the darkness. He saw a lot of blood on the porch, however, and knew the victim was dead. He, Roberts, and the Defendant cleaned the porch with rags, water, and bleach. The three of them then dragged the victim's body away from the trailer for about four to five minutes, at which point they became tired and stopped. No one dug a hole or covered the victim. Schill confirmed that he and Roberts each took off one of the victim's boots. Schill said he did not take off any of the victim's other clothes, however, and also said that the Defendant carried nothing with him as the three of them returned to his trailer.

Upon his return to the trailer, Schill showered in order to wash off the victim's blood. He then went to sleep. He saw the Defendant in the morning. They did not discuss the previous evening's events. Schill returned to the Defendant's property after school, at about 4:00 p.m., at which time the Defendant was no longer present. The police arrived about that time. Schill told them the truth after about ten or fifteen minutes of questioning.

Gene Miller, Kathy's husband, also testified. He knew the victim through Kathy and did not mind that they were dating. In late February 2006, he had moved to Tennessee from Las Vegas, Nevada. He lived near the Defendant's property with his and Kathy's children. Kathy sometimes stayed with them but most often did not. Gene was acquainted with both the Defendant and the victim. He said the Defendant loved Kathy and was not a violent person. He had known the victim to be violent, however. When Gene first arrived in Tennessee, Kathy had two black eyes. The victim appeared on Gene's front lawn shortly after his arrival in Tennessee. The victim was drunk and attempted to taunt Gene into a fight, which Gene declined. The victim walked onto Gene's porch and threatened him. Gene called 911. The victim left upon hearing sirens.

Gene was present at the Defendant's property on March 21, 2006, until about 10:00 p.m. He did not witness any problems. The next morning Gene received a call from Kathy asking him to pick her up from the Defendant's trailer. While doing so, he saw the Defendant but not the victim. Later that day, the Defendant came over to Gene's house. Kathy was still there and repeatedly asked the

Defendant if he had seen the victim. The Defendant replied that he had not but asked Gene for a razor and hair dye.

A few hours later, after dyeing his hair and shaving, the Defendant asked Gene to drop him off back at his trailer. As it happened, they made two trips. On the first trip Kathy, Gene, the children, and the Defendant all went. As they approached the Defendant's property, however, they saw a number of police cars. The Defendant told him not to stop. Gene drove back to his house and dropped off Kathy and the children. Gene and the Defendant then returned to the Defendant's property. The police cars were still there, and the Defendant again told Gene not to stop. He apparently asked to be dropped off out of sight of his property.

The State also presented testimony from various law enforcement personnel. Deputy Steven Elrod of the Putnam County Sheriff's Department testified that he assisted at the crime scene on March 22, 2006. The Defendant was not present. At some point, he received information that the Defendant might be found at Kathy's house. Deputy Elrod planned to meet other law enforcement personnel at a predetermined spot on Hanging Limb Highway before searching for the Defendant. On the way to the place they were to meet, Deputy Elrod saw a man walking down the side of the highway. He did not see the man's face. Upon reaching the meeting place, Deputy Elrod asked whether anyone else had seen the man. No one else had. He decided to drive back up the highway and clarify the man's identity. Deputy Elrod found the man and recognized his face as matching the Defendant's description. As Deputy Elrod approached him, the man put his hands in the air and said, "[Y]ou're looking for me." Deputy Elrod asked the man, "[A]re you [the Defendant]?" The man replied affirmatively. Deputy Elrod arrested him.

Detective Bob Crabtree of the Putnam County Sheriff's Department was ordered to investigate the Defendant's property. He testified that he arrived at 3:55 p.m. on March 22, 2006, with the task of collecting evidence. Other law enforcement officials were already present. The Defendant was not.

Detective Crabtree introduced nearly forty pictures taken at the crime scene. Many depicted the back porch area of the Defendant's trailer. Brain matter and blood were found on the rafters of the porch overhang and on a nearby retaining wall. Detective Crabtree identified blood splatter to the left of the door leading from the porch into the trailer. Blood was also evident on the door into the trailer; the door opened outward onto the porch, and the blood appeared on the side of the door that would face the inside of the trailer if the door were closed. Detective Crabtree also testified that, at about 9:20 p.m. on March 22, 2006, he and some other law enforcement personnel went into the woods to the place they had been told the victim's body could be found. They saw part of a human hand protruding from a "shallow grave." They placed deputies around the scene in order to secure it and waited until daylight to unearth and photograph the body. Detective Crabtree introduced photographs of the victim's body covered by dirt, leaves, and branches, and in various stages of being unearthed.

Detective Crabtree also introduced various pieces of non-photographic evidence, including a bloody rag, a bloody paper towel, and two shovels with blood on them. The original handle of one shovel had been replaced with a tree branch. He introduced blood samples taken from the floor and hall immediately inside the trailer door, as well as a pair of boots with blood on them. Detective Crabtree secured these items until they could be sent to the Tennessee Bureau of Investigation ("TBI") crime lab.

TBI Special Agent Steve Huntley also testified. He arrived at the Defendant's property at 6:17 p.m. on March 22, 2006. He met with Det. Crabtree and other law enforcement officials already present. Agent Huntley confirmed that he had obtained a search warrant before anyone collected evidence from the Defendant's trailer. During his investigation, Agent Huntley saw blood and brain matter on the porch area of the trailer. He found a twelve-gauge shotgun inside the trailer, from which he was unable to recover any fingerprints. He labeled the shotgun as evidence and kept it in his custody until sending it to the TBI crime lab.

The victim's body was found 391.5 feet from the Defendant's trailer. The terrain in the area was wooded and rocky, but there was a trail from the porch to the body. The body was face down and covered with branches, dirt, and leaves. After it was unearthed, the body was transported to the medical examiner's office. Agent Huntley obtained a blood spot from the victim's body and delivered it to the TBI crime lab for comparison with blood samples taken from the crime scene.

TBI Special Agent and forensic scientist Mike Turveville compared the DNA in those blood samples with the DNA in the victim's blood spot. He testified that he found the victim's DNA in the blood found on the right boot, the rag, the paper towel, the flat-ended shovel, and the blood sample taken from the floor of the trailer. Although blood appeared to be present on the tree-limb-handled shovel, Agent Turveville could not retrieve a DNA profile from it. He did not test the small spot of blood on the left boot. Agent Turveville did not find any other DNA profile on any of the evidence.

TBI Special Agent and forensic scientist Steve Scott testified regarding his examination of the shotgun found at the crime scene. He identified it as a twelve-gauge J.C. Higgins Model Twenty. It had no serial number, most likely because it was manufactured before serial numbers were required. It operated through a pump-action mechanism and required nine and a half pounds of pressure on the trigger in order to fire. Agent Scott said that this was a relatively high amount of pressure and certainly "not a hair trigger." He also noted that the shotgun had a manual safety rather than an automatic one.

Staci Turner, a medical examiner employed by Forensic Medical, testified regarding the autopsy she performed on the victim. She also introduced her autopsy and toxicology report. She identified the victim's cause of death as a gunshot wound to the head. The shot entered his left temple and exited at the top of his head, expelling a majority of his brain from his skull and causing instant death. Scrapes and gunpowder stippling around the entry wound indicated that the gun was fired within a foot of his head. The wound was consistent with one caused by a shotgun. Turner also

noticed several abrasions on the victim's back consistent with post-mortem drag marks. Finally, she noticed several small, apparently ante-mortem abrasions, on the victim's left cheek, right arm, knees, left index finger, left elbow, and left anterior lower leg.

As to the victim's toxicology, Turner testified that he had a blood alcohol level of .6 percent at the time of death, nearly eight times the legal limit for operating a motor vehicle. Vitreous fluid taken from the victim's eye contained an alcohol level of .39 percent, meaning that his body was still absorbing alcohol at the time of his death. Turner testified that a .6 percent blood alcohol level would be fatal in most people but clarified that it might not be in a chronic alcoholic. In any event, it did not cause the victim's death.

The State rested its case after presentation of these witnesses. The Defendant then moved for a directed verdict of not guilty on the charge of first degree murder, arguing that the State had presented no evidence of premeditation. The trial court agreed and granted the motion. The trial continued, the Defendant now charged with second degree murder.

The Defendant chose to testify, and gave his account of the relevant events. He had known the victim since he was about fourteen years old. The victim had met and begun dating Kathy about a year before his death. The Defendant said the victim was a nice person except when drinking, at which point he became "evil and mean and ugly, just a totally different person." The Defendant corroborated Schill's story about the victim trying to wake Kathy by hitting her on a previous occasion, and he also described two instances in which the victim had been violent toward the Defendant when drunk.

The Defendant had seen Kathy with black eyes "six, seven, eight times" during the year she had been dating the victim. He had asked Kathy to stop seeing the victim, but "she wouldn't stay away from him."

The victim stayed in the Defendant's trailer with Kathy the night of March 20-21, 2006. Naomi picked up the victim and Kathy in the morning. They returned some time thereafter with two twelve-packs and two six-packs of beer. Gene came by and drove Kathy's son Zack to do his community service. The victim and Kathy went with him. They returned between 5:30 and 6:30 p.m. with a half-gallon jug of Kessler's whiskey. From that time until about 9:00 p.m., the victim and Kathy drank in the house with the Defendant, Roberts, Schill, and Gene. During that time, they engaged in a bit of verbal argument about whether Kathy was going to go home with Gene. At about 9:00 p.m., the Defendant's mother told Roberts and Schill to get ready for bed. The Defendant told the victim to call Naomi to pick him up, but the victim refused. Schill made the call instead. When Naomi did not arrive, Roberts called her a second time.

Kathy went to the Defendant's trailer to lie down. The Defendant and the victim waited for Naomi in the yard in front of the trailer. The victim asked, "Where's Kathy?" The Defendant replied, "She's passed out. She won't get up." The victim demanded that the Defendant wake Kathy

up. The Defendant went into the trailer and tried to wake Kathy, but he was unable to do so. When he returned to the yard, he saw the victim near the back door of the trailer.

The victim and the Defendant waited for Naomi for a total of about forty-five minutes to one hour, during which time the victim became progressively more angry and violent. He continued to want to wake Kathy, repeatedly saying "Let me go beat her out of bed" and "I'm going to beat her out of bed." The Defendant continued to respond that she was passed out and resisted the victim's efforts to enter the trailer. Eventually the victim pushed the Defendant. The Defendant pushed back, at which point the victim kneed him in the leg and pushed him to the ground. After the Defendant got up, the victim tried to kick him and hit him in the back of the head with his fist. The Defendant walked toward the house in order to enlist the help of Schill and Roberts, but the victim pushed him down from behind.

The victim then walked toward the trailer. The Defendant got up and tackled him. The victim shook him off. The Defendant ran onto the porch, opened the porch door, and picked up the shotgun he stored "right there" inside the door. The Defendant identified this shotgun as the one Agent Scott introduced into evidence. With his finger on the trigger, he pointed the shotgun at the victim's chest in order "to protect [him]self" and "to tell [the victim] to leave." The Defendant noted a previous situation in which he had successfully persuaded the intoxicated and violent victim to leave by pointing a pistol at him.

The victim then reached up and grabbed the shotgun while simultaneously kicking the Defendant. The victim pulled the shotgun upward, at which point it went off. The victim fell to the ground dead. The Defendant "started freaking out" and thought, "I can't let Kathy see this." He put the shotgun back in the trailer and shut the door. He then dragged the victim's body off of the porch by its feet. Unable to continue to move the body by himself, the Defendant woke up Roberts and Schill. In getting the two boys to help him rather than calling the police, the Defendant said he was just "being stupid" because he did not want Kathy to know what had happened to the victim.

The Defendant, Schill, and Roberts dragged the body into the woods. They stopped when they became tired. The Defendant stripped the victim's face-down body so that Kathy would be unable to identify it by sight. The next morning, he used the shovel with the tree branch handle to cover the victim's body with dirt and branches. He did not dig a hole. The Defendant admitted that he lied to both Naomi and Kathy and that he was scared of being interrogated by the police. He maintained that he did nothing wrong until after the shooting and that he had only been trying to protect himself and his sister.

Finally, the Defendant called Frank Moore as a character witness. Moore testified that the Defendant, who had done some work for him in the past, was respectful, honest, a hard worker, and had no temper.

The trial court instructed the jury on abuse of a corpse. As to the killing of the victim, the trial court instructed the jury on second degree murder, voluntary manslaughter, reckless homicide,

and criminally negligent homicide. The jury convicted the Defendant of voluntary manslaughter and abuse of a corpse. The trial court sentenced him to consecutive terms of nine years for voluntary manslaughter and two years for abuse of a corpse, for a total effective sentence of eleven years to be served in the Tennessee Department of Correction. He now appeals.

## Analysis

### I. Sufficiency of the Evidence

The Defendant first challenges the sufficiency of the evidence used to convict him of voluntary manslaughter. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

"Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a). Voluntary manslaughter has both a subjective and an objective element. The proof must establish that a defendant killed the victim while in a subjective state of passion. The proof must also establish that a defendant's subjective state of passion was produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(a).

The Defendant primarily argues that no evidence was presented of any motive or intent to kill on his part. We disagree. The Defendant provided the only factual account of the events immediately surrounding the victim's death; the jury was not thereby required to believe every element of that account, however. The jury evidently did not find credible the Defendant's claim that the shooting was accidental, a decision supported in part by the substantial weight of the trigger pull on the Defendant's shotgun. The Defendant, pulling the shotgun's trigger non-accidentally, would certainly have been aware that such an act was reasonably certain to cause the victim's death under the circumstances of this case.

The jury apparently also noted the victim's inflammatory behavior, which included physical threats to both the Defendant and his sister, as well as a series of assaults on the Defendant. We conclude that this evidence reasonably supports an inference that the killing, while not accidental, was committed "in a state of passion sufficient to obscure [the Defendant's] reason and that the passion was produced by reasonable and adequate provocation." See State v. Brown, 836 S.W.2d 530, 554 (Tenn. 1992). The Defendant had been attacked by the victim before reaching the porch and knew of the victim's refusal to leave and his desire to hurt the Defendant's sister. This is sufficient to establish the Defendant's subjective state of passion. The victim's belligerent insistence on "beat[ing] [Kathy] awake" is also sufficient to establish provocation adequate to inflame the objective, reasonable person. We therefore conclude that the evidence at the Defendant's trial was sufficient to support his conviction of voluntary manslaughter beyond a reasonable doubt.

**II. Defense Motion for a Mistrial**

During the portion of Gene Miller's testimony in which he described driving the Defendant back to his trailer on March 22, 2006, the following exchange took place:

> [The State]: And who went on the second trip?
>
> [Miller]: Just me and [the Defendant].
>
> [The State]: And did you stop? Were the police still there when you passed?
>
> [Miller]: Yeah.
>
> [The State]: Did you stop at that time?
>
> [Miller]: Nope.
>
> [The State]: And why didn't you stop that time?
>
> [Miller]: Well, like [the Defendant] kept saying, "There's cops, keep going, because [the Defendant] can't talk to the cops because he's on parole or something [sic]."

> [The Court]: Well, we don't know that, and so we'd ask the jury to disregard that. It's got nothing to do with this case, and that's not evidence, and so, not in any way you should consider that as any implication on the [D]efendant or anybody else in this case.

The Defendant then requested and received a jury-out conference, at which he moved for a mistrial based on an "impermissible tainting of the jury" against him. Defense Counsel argued that a "curative instruction [was] not sufficient to protect [the Defendant's] interest" and noted that "[i]t was agreed with the [S]tate that there would be no mention of prior difficulties [the Defendant] may or may not have had with the law . . . ." The conference continued:

> [The State]: Your honor, I didn't purposely solicit that answer. I have reviewed Mr. Miller's statement several times, and I talked to both Agent Huntley and Detective Bob Crabtree. Nowhere in his statement did it state that the [D]efendant told Mr. Miller to keep going because he was on either probation or parole . . . . [Mr. Miller] never told Agent Huntley, once again, nor Detective Crabtree, that that was the reason why they kept going. What he told me, when I interviewed him, and what is in his statement was, he told Mr. Miller to keep on going, period.
>
> [The Court]: Well, arguably, obviously, a pretty serious comment. I think at this time, though . . . I'm going to overrule [the Defendant's] motion for a mistrial. I think that is something that could result in a mistrial, or a reversal. I think the fact that we did advised [sic] the jury immediately to disregard it and we don't know that that's the truth, and that they should not consider it in any way, we will proceed with the belief at least that they will follow the instructions of the court.

The trial court again denied the Defendant's renewed motion for a mistrial at the close of the State's proof.

In a criminal trial, a mistrial should only be declared "in the event of a 'manifest necessity' that requires such action." State v. Reid, 164 S.W.3d 286, 341 (Tenn. 2005) (quoting State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). An abstract formula should not be applied mechanically in determining whether a mistrial was necessary, and all relevant circumstances should be taken into account. State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993). Whether a mistrial should be granted is a determination left to the sound discretion of the trial court. Reid, 164 S.W.3d at 342 (citing State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994)). The trial court's decision should not be overturned absent an abuse of discretion. Id. Additionally, the party arguing that a mistrial should have been granted bears the burden of establishing its necessity. Id. (citing Williams, 929 S.W.2d at 388).

This Court has noted three non-exclusive factors to evaluate whether a mistrial was necessary because inappropriate testimony was presented to the jury: "(1) whether the [S]tate elicited the testimony; (2) whether the trial court gave a curative instruction; and (3) the relative strength or weakness of the State's proof." State v. Lawrence Taylor, No. W2002-00183-CCA-R3-CD, 2003 WL 402276, at *4 (Tenn. Crim. App., Jackson, Feb. 14, 2003).

The State argues that the Defendant has waived this argument by his failure to cite to authority in his brief. Tenn. R. Crim. App. 10(b). We agree. Briefly turning to the merits of the issue, however, we note that the State did not elicit the offending testimony: Miller had mentioned nothing about the Defendant's parolee status in any previous interviews with law enforcement or the State. We also note that the trial court immediately gave a strong curative instruction.

Our evidentiary review on this issue is confined to the State's evidence only. We acknowledge that the State's evidence against the Defendant was not overwhelming. The State presented no direct evidence that the Defendant was the shooter. It presented no direct evidence that the killing was knowing or intentional. The weight of circumstantial evidence was enough, however, to persuade us that the trial court did not abuse its discretion in denying a mistrial. Staci Turner testified that the victim's wound was consistent with a shotgun blast, and a shotgun was found in the Defendant's residence. Blood and brain matter were found on the Defendant's porch. The Defendant woke Roberts and Schill for assistance in hiding the victim's body and led them directly to it. No witness testified to the presence of anyone but the Defendant and the victim on or near the Defendant's porch around the time of the victim's death. Finally, we note that Miller merely mentioned that the Defendant was "on parole or something"; he did not mention any particular crime of which the Defendant had been convicted.

These circumstances do not support a finding that there existed a "manifest necessity" for a mistrial. We conclude that the trial court did not abuse its discretion in denying the Defendant's motion. This issue is without merit.

**III. Defense Motion to Sever**

Before trial, the Defendant requested severance of his charges for first degree murder and abuse of a corpse because a finding of guilt on one would tend to prejudice the jury on the other. The trial court denied the motion.

The State first argues that the Defendant has waived this issue by his failure to cite to authority in his brief. Tenn. R. Crim. App. 10(b). Again, we agree. We will briefly discuss the merits, however, noting that Tennessee Rule of Criminal Procedure 14(b)(1) provides that a defendant "shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others."

We need not decide whether the trial court committed error in denying a severance because any error is harmless. Tennessee Rule of Criminal Procedure 52(a) provides that "[n]o conviction shall be reversed on appeal except for errors that affirmatively appear to have affected the result of

the trial on its merits." The Defendant essentially admitted to abusing the victim's corpse. He has further failed to demonstrate that the evidence of that crime affected the result of his trial with respect to his other charge. The jury chose to convict him of voluntary manslaughter rather than second degree murder; this suggests that jurors remained unaffected by the "outrage" the Defendant claims the State tried to engender in them through contemporaneous presentation of evidence that he abused the victim's corpse. This issue is without merit.

**Conclusion**

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

_____

DAVID H. WELLES, JUDGE